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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948.~~ 1949

No. [redacted] 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1948.

No. 743

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ADDITIONAL STATEMENT OF THE CASE.

The Real Question Upon Which This Case Was Tried.

This is the rare case in which a jury returned a verdict for the defendant in a death action under the Federal Employers' Liability Act, a verdict which demonstrates the truth of Mr. Justice Black's statement in *Wilkerson* v. *McCarthy*, No. 53, decided January 31, 1949, 69 S. Ct. 413 at 417, that the "unarticulated assumption • • • that juries will invariably decide negligence questions against railroads • • • is contrary to fact."

The petition for writ of certiorari would make it appear that the issue upon which this case was tried and argued to the jury was whether the plaintiff was re-

quired to prove negligence in fact in addition to the violation of the Safety Appliance Act. But that was not the issue upon which the case was tried and argued to the jury. The theory of the defense was that the decedent was not killed on the movement in which the coupler broke, as plaintiff contended, but, rather, that he was killed on the final movement out of the yard, as to which no negligence or other ground of liability was charged. This was clearly stated to the jury in the opening statement of defendant's counsel (Tr. 25, 26) and it was this contention which he argued at length in his closing argument to the jury (Tr. 157, 161-171). Since there were no eyewitnesses to the fatal accident, and more than an hour elapsed from the time the decedent was last seen alive until his body was found, during which time the two movements had been made (Tr. 97-98), the question was clearly for the jury, under the rule stated in *Lavendar* v. *Kurn*, 327 U. S. 645. The "historic function" of the jury to decide this purely factual question was observed in this case, and both the district court, on the motion for new trial, and the court of appeals, on the appeal, have upheld the jury's verdict.

The contention of the petitioner, however, is that the basic question of negligence on her version of the accident should have been taken from the jury, by a peremptory instruction that the breaking of a coupler was negligence *per se*, and conclusive evidence of a violation of the Safety Appliance Act. This is not the law, nor does it accord with the view so frequently expressed by this court in the past decade that where different inferences can be drawn, the choice between them is for the jury. The defendant contends here, as it did in the courts below, that it was for the jury to determine first, in which movement was the decedent killed, and second,

but only if they found he was killed in the first movement, whether the defendant was guilty either of negligence or of a violation of the Safety Appliance Act because a coupler broke in a "very violent stop."

SUMMARY OF THE ARGUMENT.

I.

The questions urged in the petition for certiorari are not the real issues upon which this case was tried and argued to the jury.

1. See opening statement of plaintiff's counsel (Tr. 21), the opening statement of defendant's counsel (Tr. 25) and the closing argument of defendant's counsel (Tr. 157, 160-169).

2. It was the function of the jury to determine from the circumstantial evidence whether the decedent was killd on the first movement (as contended by the plaintiff) or on the final movement out of the yard (as contended by the defendant).

Wilkerson v. *McCarthy*, No. 53, October, 1948, Term, 69 S. Ct. 413;
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35;
Lavendar v. *Kurn*, 327 U. S. 645;
Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481, 491.

II.

The principle that the fact that a coupler breaks is evidence from which a jury may infer, but is not compelled to find negligence or a violation of the Safety Appliance Act is authoritatively settled by decisions of this Court.

Minneapolis etc. R. Co. v. *Gotschall*, 244 U. S. 66;
New Orleans etc. R. Co. v. *Scarlet*, 249 U. S. 528.

1. Since these authoritative decisions, both state and federal courts have uniformly held that the breaking of a coupler does not demand a finding that the couplers

III.

No substantial question, warranting review by this Court, is presented by any properly preserved objection to the trial court's charge to the jury.

"No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 51, Rules of Civil Procedure.

"In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

Palmer v. *Hoffman,* 318 U.S. 109, 119.

1. The court properly instructed the jury on the provisions of the coupler state, and left to the jury the question of fact whether the coupler which broke violated the statute.

See cases cited under Point II.

2. The instructions did not confuse negligence with the charge of violation of the Safety Appliance Act.

See Argument.

3. The court properly instructed the jury they could not presume from the fact of the accident that the decedent was killed because of the broken coupler.

Brady v. *Southern Ry. Co.,* 320 U.S. 476, 484;
Tennant v. *Peoria & P. U. Co.,* 321 U. S. 29.

ARGUMENT.

I.

The contentions raised by the petition for certiorari are not the real issues upon which this cause was tried and argued to the jury.

The contentions argued in the petition for writ of certiorari—whether the breaking of a coupler is "negligence *per se*" or *conclusive* evidence of a violation of the Safety Appliance Act, and whether the jury was fully instructed on every facet of this issue—were not the issues upon which this case was tried and argued to the jury.

From the time the decedent was last seen by his brother, the foreman of the crew, until his body was found, more than an hour later, by the same brother, there had been only two movements along the track where his body was later found. The issue upon which this case was tried was whether the fatal accident occurred in the *first* of these movements, in which the coupler broke, and as to which plaintiff charged both negligence and a violation of the Safety Appliance Act, or in the *second* movement, as to which no negligence of any kind was charged. The directly opposite contentions of the parties were clearly stated in the opening statements to the jury. Plaintiff's counsel said:

> "So, it is our contention that the conclusion is inevitable that the time he was run over and killed, as shown by the physical facts and circumstances, was when the coupler broke loose while he was engaged in the course of his duties between the cars, and that the defective coupler was the proximate contributing cause of this accident." (Tr. 21).

footnote references to the testimony which supports the argument of defendant's counsel:

1. The presumption that the decedent, knowing the next move was to be made into this track, would not knowingly put himself in a position of danger between the cars.[1]

2. The fact that all the open couplers of the cars at the west end of the track coupled up following the impact, indicated that at the time of the impact, the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing.[2]

---

[1] The decedent had been continuously in the employ of the defendant 23 or 24 years and had worked on this particular job about two years. (Tr. 63) Jack O'Donnell, his foreman, told decedent, just before he went down to track 5 (where the accident occurred) that he had one car for track 5, the balance to go to track 1 and the set-backs on track 2. (Tr. 36, 79). The presumption that the deceased exercised due care for his safety having this knowledge, was a proper circumstance for the jury's consideration. **Tennant** v. **Peoria & P. U. Ry. Co.**, 321 U. S. 29, 34. See defendant's argument on this point at Tr. 161-162.

[2] Starting from the west end of track 5, there were cars coupled together, then a space of about a car length, between the third and fourth cars, then a little gap, then the fifth and sixth cars then a gap between them and the remainder of the train. (Tr. 37, 78). These cars had failed to couple upon earlier movements into track 5, and presumably the drawbars were out of alignment or the knuckles were closed. (Tr. 37, 70). It was this situation which the decedent went to track 5 to correct. (Tr. 38). Starting from the west end of the track, as he did, the first coupler which he would adjust was on the east end of the third car from the west, where plaintiff contends he was standing when the impact occurred. The fact that all the couplers "made" on that impact tended to show that he had completed the adjustment of the couplers on the fourth, fifth and sixth, and possibly the seventh car, which would place him at least 200 feet farther east. No reason is suggested in the record why, if he had completed the adjustment of the most easterly open coupler he would go back to the most westerly opening where, presumably, he had already made the adjustment. See defendant's argument at Tr. 162.

3. Although Jack O'Donnell knew the exact sequence and timing of the movements made, there was nothing about the breaking of the coupler which suggested to him that any harm might have resulted to his brother from the movement in which the coupler broke.[3]

4. Jack O'Donnell did not see any body or any indication of an accident when sometime after this first movement, he walked down along the north side of the cars on track 5, flashing his lantern in between the cars to see if all the couplings had made. He walked "right alongside the track" for a distance of ten carlengths, right past the spot where his brother's body was later found and where, if he had been struck by the first movement, his body must have been lying along the north rail in the space between two of the cars where Jack flashed his lantern.[4]

---

[3] Jack O'Donnell's testimony on cross-examination, was:

"Q. You knew your brother was somewhere down in that vicinity or at least he had gone down track 5 at the time you were moving this cut of cars out of track No. 2?

A. Yes.

Q. But there was nothing about that incident as it happened there that aroused any suspicion in your mind that anything might have happened to him in the course of the movement which had just been made at that time?

A. That is true." (Tr. 90).

Defendant's argument on this phase of the case is set forth at Tr. 163.

[4] See the testimony of Jack O'Donnell at Tr. 47, 48, 92, 93. If, as plaintiff claims, the decedent was struck as he attempted to adjust the coupler on the east end of the third car, then since the impact moved the cars about a carlength (Tr. 89) and the drag marks along the track show his body was dragged 45 feet (Tr. 54, 125), which was the average length of the cars they were handling that night (Tr. 31), his body would have been right at the opening between the two cars and, we submit, Jack O'Donnell could not possibly have failed to see the body or the drag marks out-

259-264), the objections to the instructions given (Tr. 194), the motion for new trial (Tr. 216-219, 221), or the statement of points relied upon (Tr. 224-230) qualified the fact of breaking by the phrase "in normal use" or any equivalent languge. But passing that question and coming to the merits of plaintiff's contention, we think that the language of the statute itself, and the decisions of this Court have settled for more than thirty years the rule that the fact that a coupler breaks while in use is evidence from which a jury *may infer* that the coupler did not comply with the statute, but is not *conclusive* evidence of such a violation.

Unlike other provisions of the Safety Appliance Act, which require the carrier to use "safe" or "efficient" or "secure" devices and appliances (45 U. S. C. A. 33, 4, 11, 23), the coupler provision of the Safety Appliance Act imposes a specific functional test: that the couplers shall "couple automatically by impact" and "can be uncoupled without the necessity of men going between the ends of the cars" (45 U. S. C. A. §2). The evils against which the statute was directed were those which attended the old-fashioned link and pin couplings and the purpose of the statute was to enable employees to couple and uncouple cars without going between the ends of the cars. *St. Louis and S. F. R. Co.* v. *Conarty*, 238 U. S. 243, 250. The only absolute duty imposed on the carrier is that the coupler shall comply with this specific functional test; there is no absolute duty that the coupler shall not break while in use, whether in normal use or in a very violent stop.

More than thirty years ago, in *Minneapolis etc. R. Co.* v. *Gotschall*, 244 U. S. 66, in a unanimous opinion by Mr. Chief Justice White, this Court held that

> "in view of the Safety Appliance Act, negligence *might be inferred* from the mere opening of the couplers." (Emphasis supplied.)

Two years later in *New Orleans etc. R. Co.* v. *Scarlet,* 249 U. S. 528, this Court, in an opinion by Mr. Justice Brandeis, decided the precise question which plaintiff seeks to argue again here. In the *Scarlet* case, the accident was caused by the breaking of the king pin of the coupler and the coupling chains between the engine and the tender (249 U. S. at 529). In the trial court plaintiff had relied upon the state "*prima facie* act" as dispensing with proof of negliegnce; on appeal it was conceded that this error, as held in *New Orleans etc. R. Co.* v. *Harris,* 247 U. S. 367, and the judgment in plaintiff's favor must be reversed unless the error was harmless, as plaintiff contended, because "the mere breaking of the king pin and coupling chains shows conclusively that they were defective" and therefore violated the absolute duty imposed by the Boiler Inspection Act (45 U. S. C. A. §23), one of the Safety Appliance Acts. This is precisely the contention advanced by the plaintiff here. This Court held (p. 530):

> "• • • it is clear that the evidence did not establish as a matter of law that the king pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co.* v. *Gotschall,* 244 U. S. 66."

Following these decisions, the courts have uniformly held that the breaking of a coupler "does not demand a finding that the couplers were defective," but "at most presented a question for the jury." *Western & Atlantic R. R.* v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635; *Cochran* v. *Pittsburgh & L. E. R. Co.* (D. C.

v. *Eisenhart* (C. C. A. 3), 280 Fed. 271.[9] The fact that in these cases the jury decided the issue for the plaintiff does not mean that the issue must always be withheld from the jury and decided by the court.

The supposed "conflict" upon which plaintiff relies for allowance of the writ is, as Mr. Roberts pointed out twenty years ago, merely "a conspicuous illustration of the dangers incident to so sweeping a generalization"; the "true rule to be deduced from the cases" is that "proof that the cars became uncoupled while in use, without human intervention, either because the coupler or some part thereof broke, or for some unexplained reason, is evidence from which a jury is *entitled to infer* that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated." (Emphasis supplied.) Roberts, Federal Liabilities of Carriers (2nd ed., 1929), Sec. 620; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865. Even evidence that upon a particular movement, a coupler failed to couple automatically by impact, or to uncouple at the first attempt is merely evidence from which a jury may properly find that the statute was violated. *Penn* v. *Chicago & N. W. Ry. Co.*, 335 U. S. 849, reversing 163 F. 2d 995; compare *Myers* v. *Reading Co.*, 331 U. S. 477. The fact that the coupler broke is no more conclusive evidence than this. The question is for the jury, not for the court to determine by peremptory instruction for either party.

The issue which plaintiff seeks to raise by her petition for certiorari has long been settled adversely to her con-

[9] "For evidence of negligence in support of the counts under the Safety Appliance Act, the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled * * * * * the case was properly submitted and the verdict should be sustained on the inference of defendant's negligence to be drawn from the mere opening of the couplers." 280 Fed. at 272, 275.

tentions by the decisions of this court, and has been understood and followed by federal and state courts. The courts below followed and properly applied the rule. No useful purpose would be served by reviewing the question again.

III.

No substantial question, warranting review by this Court, is presented by any properly preserved objection to the trial court's charge to the jury.

Petitioner's mistaken belief that the breaking of a coupler is negligence *per se,* and the fact that a coupler breaks conclusively establishes a violation of the Safety Appliance Act permeates her criticism of the court's instructions and the argument of defendant's counsel. As we pointed out in our Additional Statement of the Case and under Point I of our Argument, the principal question argued to the jury by defendant's counsel was that the decedent was killed in the final movement of the cars out of this yard, as he was either attempting to climb between the cars, as the men often did (Tr. 93, 103), or as he was riding the cars down to the switchmen's shanty, as was his habit (Tr. 96). We believe that when a jury decides a case like this for the defendant, they do so because they accept the version of the accident for which defendant's counsel contends. If, as we believe, this jury concluded that the decedent was killed in the final movement out of the yard, then the breaking of the coupler had nothing whatever to do with his death, and nothing in the court's instructions nor the argument of defendant's counsel about the legal significance of the breaking of the coupler could have in any way affected the outcome of this case. However, upon plaintiff's theory that he was killed in the earlier movement, we submit the jury was correctly instructed and the case was fairly tried.

"That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

and, a little later (Tr. 188):

"Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty. But as I said before, in the event you find that such violation of the Federal Appliance Act is the proximate cause of his death, then negligence or contributory negligence on the part of the decedent is entirely immaterial and does not affect his right to recover the amount of damages."

This latter portion of the charge is substantially as requested by plaintiff's proposed instruction No. 5 (Tr. 261) with the correct substitution of "may find" for the peremptory "should find." Under the cases we have cited, these portions of the charge properly submitted to the jury the question whether the coupler violated the test of the statute.

These instructions did not leave to the jury any legal question as to the construction of the statute. The court told the jury just what the statute provides; that the railroad was under "an absolute duty" to provide such couplers; and that if the defendant used and operated a car with a defective coupler, contrary to the statute, and

the coupler broke, and as a direct and proximate result thereof, plaintiff's decedent came to his death, they might find the defendant guilty. While this charge does not embody plaintiff's mistaken notion as to the applicable rule of law, the charge does state the correct rule, and left to the jury's determination the two basic questions of fact: first, did the coupler comply with the statute, and second, did the broken coupler cause the man's death. The court would not have been justified in embellishing the statute by referring to "safe coupling devices" or generalizing abont "defective couplers." The statutory test is simple and readily understandable; no further explanation than the words of the statute was necessary, nor, for that matter, was any such elaboration ever requested by the plaintiff in the trial court.

In his dissenting opinion in the court of appeals, Judge Minton predicates error on the failure of the trial court to instruct the jury that it might infer negligence from the breaking of the coupler. Judge Minton recognized that plaintiff did not object to this failure to instruct as required by Rule 51 and the well-settled federal appellate practice. (Tr. 250; 171 F. 2d at 978). But in plaintiff's petition for rehearing in the court of appeals, her counsel insisted "it was not our theory in the trial court, nor is it in this court, that the breaking of a coupler is merely ground for an inference of a violation of the Act." Petitioner has not only waived in the trial court any right to rely upon the proposition advanced by Judge Minton, but she expressly repudiated it in the court of appeals. We think we need not concern ourselves further with Judge Minton's theory.

Finally, petitioner argues that defendant's counsel misstated the law as to the carrier's duty with reference to couplers in his argument to the jury. Inasmuch as plaintiff's counsel had argued that the statutes "make the rail-

road company absolutely liable in this case if a coupler broke" (Tr. 146), we think the argument of defendant's counsel properly directed the jury's attention to the language of the statute as the court had stated he intended to, and later did charge the jury. The court's ruling:

> "The jury will be governed by what the court instructs them as to the law and not what counsel says * * * you will take your instruction as to the law from the court" (Tr. 146)

removed any possibility of prejudicial error from any misstatement of either counsel as to the law. The court also pointed out to plaintiff's counsel that "you will have a chance to protest when you answer him" (Tr. 159). When his chance came, he dismissed it summarily with "I don't have to waste time discussing it" (Tr. 177). There is no reviewable error in this to warrant the attention of this Court.

2. *The instructions did not confuse negligence with the charges of violation of the Safety Appliance Act.*

The complaint originally charged five "negligent acts" (Tr. 5), two of which, (d) and (e), were withdrawn by the plaintiff at the close of the case (Tr. 139) and one of which, (c), was amended (Tr. 13). The charges which went to the jury were that the defendant:

> "(a) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.
>
> "(b) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.
>
> "(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along

> the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act."

Plaintiff's tendered instruction No. 1 repeated these charges, omitting only the word "carelessly" (Tr. 260). Thus the plaintiff herself posed her case on charges that the defendant "negligently" violated the Safety Appliance Act, in addition to ordinary negligence in the movement of the cars.

The trial judge, however, carefully drew the distinction between the two charges in his instructions. In summarizing the allegations of the complaint, he pointed out that the second and third "acts of negligence which she charges" were the failure to equip and maintain the described couplers (Tr. 183); he pointed out that these allegations "charge specific acts in violation of the Federal Safety Appliance Act" (Tr. 183); that the defendant was under "an absolute duty to provide the couplers • • • in such order as the statute indicates" (Tr. 186); that the first determination to be made by the jury was "whether or not the defendant is guilty of one or more or all of these acts of negligence" (Tr. 187); that contributory negligence must be considered on the first charge but that as to the charges of violation of the Safety Appliance Act, "contributory negligence does not enter into it at all" and "has no bearing whatever in this matter" (Tr. 187); and, finally, that if they believed that the defendant "used and operated a car with defective coupler, contrary to the provisions of the Safety Appliance Act, and that said coupler broke", which caused the death of plaintiff's decedent, "then negligence or contributory negligence • • • is entirely immaterial and does not affect his right to

recover" (Tr. 188). Notwithstanding the fact that under both the allegations of her complaint and her tendered instructions, plaintiff would have been required to prove that the defendant "negligently" used a coupler which violated the statute, the trial judge, in his instructions to the jury, carefully drew the distinction between the charge of ordinary negligence and the charges of violation of the coupler statute. He told the jury that the use of a coupler which violated the statute in itself was the act of negligence charged in the second and third specifications of negligence; that if the jury found the defendant used such a defective coupler and the coupler broke "negligence is entirely immaterial." Certainly these instructions told the jury that the use of a coupler which violated the statute was an act of negligence and in itself sufficient to impose liability upon the defendant if the broken coupler caused the man's death; to add that it was also "negligence *per se*" could not have aided a jury of average American citizens.

Petitioner argues that the court's "charge as a whole" would lead the jury to understand that "plaintiff had to prove negligence" and that "this requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violation of the Safety Appliance Act." But no such objection to the "whole charge" was taken in the trial court, and "where part of the charge was correct he may not through a general exception obtain a new trial." *Palmer* v. *Hoffman*, 318 U. S. 109, 199. Moreover, as concerns the "charge as a whole," we submit that the court of appeals correctly pointed out (Tr. 248; 171 F. 2d at 977):

> "Moreover, upon examination of all the instructions given, we find that the court correctly explained to the jury, the issues and the law applicable thereto. He told the jury that if they found the coupler did not

comply with the requirements of the statute and that as a result O'Donnell had been killed in the movement which followed, they could find defendant guilty. He distinctly and in express terms called attention to the three grounds of liability charged, and the statutes involved. He defined negligence, proximate cause, the preponderance of the evidence and instructed them as to the limited extent to which contributory negligence entered into the issues. Under these circumstances we do not believe that the instructions considered as a whole were erroneous."

3. *The court properly instructed the jury on the question of proximate cause.*

Petitioner also complains of that portion of the charge by which the jury was instructed that the mere happening of the accident by which the decedent lost his life does not in and of itself create a liability upon the defendant; that the fact of such an accident carries no presumption of negligence; that the evidence must point to the fact that the defendant was guilty of one of the three allegations of negligence in plaintiff's complaint; that they could not guess between the various causes of the accident and find that the negligence charged was the proximate cause of the accident if there was no satisfactory foundation for such a conclusion.

These portions of the court's charge do not tell the jury that they may not infer either negligence or a violation of the statute from the breaking of the coupler. This instruction has nothing to do with inferences of negligence; as the court of appeals pointed out (Tr. 248, 171 F. 2d at 977):

'The criticized instruction is directed to the question of proximate cause. It correctly cautioned the jury that they could not presume from the fact of the acci-

dent that O'Donnell was killed because of the breaking of the coupler. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483."

The "accident" referred to in this instruction is not the breaking of the coupler, but is the running over of the decedent. The real issue in this case was whether the accident in which O'Donnell was killed occurred on the first movement, as to which negligence was charged, or on the final movement out of the yard. The fact that he was accidentally killed did not give rise to any presumption that it was one movement rather than the other. Liability arises from negligence; not from the mere fact of injury. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484. Mere speculation cannot do duty for probative facts. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The challenged instruction properly protected the defendant against a verdict based upon sympathy and guess-work. Petitioner's criticism wholly misunderstands the subject matter of this instruction.

CONCLUSION.

This is not a case in which plaintiff was "deprived of all benefit of the Safety Appliance Act." It is simply a case in which plaintiff's counsel failed to convince the jury that the decedent was killed in the movement in which she charged the Safety Appliance Act was violated.

We think plaintiff lost her case not because the jury were in any way confused about the absolute duty imposed by the coupler statute or the probative force to be given to the fact that a coupler broke, but because her counsel could not explain to the jury how, if William O'Donnell were struck by the first movement of cars, his

brother Jack could walk "right alongside the track" past his brother's body and not see it. The jury found that he was not killed as the result of the broken coupler and not one of the errors charged here could bave affected that verdict. And even if the jury concluded that the broken coupler was not a violation of the specific functional test of the statute, that was their prerogative. The plaintiff had a full and fair trial, the errors complained of did not affect its outcome and the verdict of the jury approved by both courts below should not be disturbed.

Respectfully submitted,

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